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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/445,043	03/20/2000	IAN BAIRD-SMITH	350013-65	9395
34205	7590	06/16/2006	EXAMINER	
OPPENHEIMER WOLFF & DONNELLY LLP 45 SOUTH SEVENTH STREET, SUITE 3300 MINNEAPOLIS, MN 55402				HYLTON, ROBIN ANNETTE
		ART UNIT		PAPER NUMBER
				3727

DATE MAILED: 06/16/2006

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**BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES**

Application Number: 09/445,043

Filing Date: March 20, 2000

Appellant(s): BAIRD-SMITH ET AL.

**MAILED  
JUN 16 2006  
GROUP 3700**

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Barbara A. Wrigley  
For Appellant

**EXAMINER'S ANSWER**

This is in response to the appeal brief filed March 27, 2006 appealing from the Office action mailed August 24, 2005.

**(1) Real Party in Interest**

A statement identifying by name the real party in interest is contained in the brief.

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**(2) Related Appeals and Interferences**

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

**(3) Status of Claims**

The statement of the status of claims contained in the brief is incorrect. A correct statement of the status of the claims is as follows:

. Claims 1, 3, 4, 6, 8-11, and 13 are pending and are herein appealed. Claims 14-22 have been withdrawn. Claims 2, 5, 7, and 12 have been cancelled.

Claims 1, 3, 4, 6, 8-11, and 13 have been rejected pursuant to 35 U.S.C. 103(a) as being unpatentable over Hiroshi, Japan Application 06219464.

There are no pending rejections under 35 USC 112, 1<sup>st</sup> or 2<sup>nd</sup> paragraphs.

**(4) Status of Amendments After Final**

The appellant's statement of the status of amendments after final rejection contained in the brief is incorrect.

The amendment after final rejection filed on December 23, 2005 has not been entered.

**(5) Summary of Claimed Subject Matter**

The summary of claimed subject matter contained in the brief is correct.

**(6) Grounds of Rejection to be Reviewed on Appeal**

The appellant's statement of the grounds of rejection to be reviewed on appeal is substantially correct. The changes are as follows:

Claims 1, 3, 4, 6, 8-11, and 13 have been rejected pursuant to 35 U.S.C. 103(a) as being unpatentable over Hiroshi, Japan Application 06219464.

There are no pending rejections under 35 USC 112, 1<sup>st</sup> or 2<sup>nd</sup> paragraphs.

### **(7) Claims Appendix**

The copy of the appealed claims contained in the Appendix to the brief is correct.

### **(8) Evidence Relied Upon**

JP 6-219464                    HIROSHI                    9-4994

### **(9) Grounds of Rejection**

The following ground(s) of rejection are applicable to the appealed claims:

Claims 1,3,4,6,8,9, and 13 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hiroshi (JP Application 06219464).

Hiroshi teaches a can having a flexible member **3** adhesively secured to the can end, a rigid cap **5** having a laminar member and a skirt **7** extending downwardly from a peripheral edge thereof, and a deformable ring member **6** secured to the rigid cap (see fig. 8).

Hiroshi is silent regarding the spacing between the laminar member and the flexible membrane.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to make the spacing between the laminar member and the flexible membrane less than the maximum possible extension of the deformable member towards the laminar member to prevent rupture of the flexible member due to excessive pressure within the closed can and to limit the stress placed on the peel seal for limiting the possibility of its failure.

Wherein it is asserted pre-stressing occurs upon application of pressure to the membrane, the membrane of Hiroshi is pre-stressed.

Regarding claim 4, the outer portion **2** of the can comprising the screw threads has an upper edge that is considered to be a flange.

Regarding claim 9, Hiroshi teaches the claimed invention except for the flexible membrane being made of a metal foil. It would have been obvious to one having ordinary skill in the art at the time the invention was made to make the flexible membrane of metal foil, since it has been held to be within the general skill of a worker in the art to select a known material on the basis of its suitability for the intended use as a matter of obvious design choice.

#### **(10) Response to Argument**

In response to appellant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the appellant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

Appellant further asserts Hiroshi does not suggest the limitation of the laminar member being next to the flexible membrane by a distance less than the maximum possible extension of the flexible membrane towards the laminar member. While it is agreed the prior art does not explicitly state this limitation, the drawings suggest the limitation is present therein. Viewing the screw threads of the cap and the distance between the uppermost thread and the cap top wall, i.e., the laminar member, the distance is small. Similarly, the spacing from the uppermost thread of the container to the container mouth is also small. Once the cap is placed onto the container mouth and the threads of the container and cap are engaged in a closed arrangement, the spacing will still be small. Wherein the drawings are not said to be drawn to scale, they are not used to anticipate the claimed invention. Rather, the drawings are used as prior art for what they reasonably disclose and suggest to one of ordinary skill in the art. The

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suggestion is that it would have been obvious to one of ordinary skill in the art at the time the invention was made to form the container assembly such that the laminar member is next to the flexible membrane by a distance less than the maximum possible extension of the flexible membrane towards the laminar member.

It is agreed Hiroshi is silent regarding the amount of flexure of the flexible membrane. Hiroshi does disclose it is desired that the membrane does not peel from the container mouth during high temperature and high pressure conditions. One of ordinary skill in the art would determine that flexure of the membrane must occur during this time. The only questions remaining are how much and what is the distance between the mouth of the container covered with the flexible membrane and the laminar member of the closure when in the closed position.

Appellant asserts the vent holes of the top wall of Hiroshi would cause the membrane to burst should the membrane come in contact with the cap top wall, thus rendering the closure inoperable. Wherein Hiroshi does not disclose the membrane bursts during the retort process, appellant's conclusion is unfounded. The presence of vent holes in the cap top wall does not effect the flexure of the membrane.

It is suggested that the membrane of Hiroshi not only flexes, but is ventable as well. The vent holes of the closure cap suggest that membrane allows venting of the container. While appellant may argue venting of the lid would avoid flexure, it is asserted that the membrane will flex prior to any venting of the container during the retort process. Thus, providing the laminar member of the cap next to the flexible membrane by a distance less than the maximum possible extension of the flexible membrane towards the laminar member would have been obvious to one of ordinary skill in the art for the reasons set forth above.

Hiroshi indicates the membrane is peeled away from the container mouth after the assembly undergoes high temperature and high pressure processing. This is evidence the container assembly of Hiroshi is operable as set forth in the rejections above.

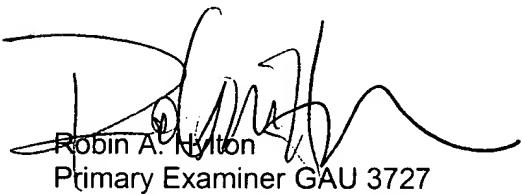
No remarks directed to appellant's arguments at pages 23-27 regarding rejections under 35 USC 112, 1<sup>st</sup> and 2<sup>nd</sup> paragraphs are provided herein, since these rejections are not pending and are not at issue with respect to this appeal. These rejections were overcome with the filing of the amendment on June 6, 2005 (prior to the final rejection mailed August 24, 2005).

**(11) Related Proceeding(s) Appendix**

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

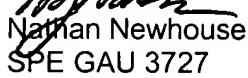
For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,



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